LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
JUL 28 1975
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1975
No. 75-148

FRED J. ZEVCHIK,
Petitioner,

vs.

THE NORFOLK AND WESTERN RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Court of Appeals
Eighth Judicial District of Ohio

SAMUEL T. GAINES
HAROLD H. SAYRE
METZENBAUM, GAINES & STERN CO., L.P.A.
1700 Investment Plaza
1801 East 9th Street
Cleveland, Ohio 44114
696-4666
Attorneys for Petitioner

HARRY T. QUICK
ARTER & HADDEN
1144 Union Commerce Building
Cleveland, Ohio 44115
696-1144
Attorney for Respondent

THE GAINES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-0647

TABLE OF CONTENTS

Opinions Below 2

Jurisdiction 2

Questions Involved 2

Statutory Provision Involved 3

Statement of the Case 3

Statement of Facts and Evidence 4

Arguments Relied On for Allowance of Writ 7

1. In an action for damages under the Federal Employers' Liability Act, where the claimed negligence of the employer is assignment of the employee, over protest, to labor beyond the employee's physical capacity to perform, the fact that a physician employed by the railroad played some role in approving the employee for work does not require proof of malpractice on the part of the physician in order to hold the railroad liable for injury resulting from such work assignments 7

2. No party may assign as error the giving or failure to give any instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection. [Ohio Rules of Civil Procedure, Rule 51(A)] 11

Conclusion 14

APPENDICES:

A. Entry of the Supreme Court of Ohio Denying Leave to Appeal 17

B. Opinion and Journal Entry of the Court of Appeals of Cuyahoga County 18
C. Judgment Entry of the Court of Common Pleas of Cuyahoga County 24

TABLE OF AUTHORITIES

Cases

Braswell v. Nickel Plate, 377 U.S. 405, 84 S. Ct. 1628 (1964) 8, 15
Davis v. Virginian Ry. Co., 361 U.S. 354 (1960) 7, 8, 9, 10, 11, 12, 13, 15
Dunn v. Conemaugh & Black Lick Railroad, 267 F.2d 571 (3rd Cir. 1959) 9, 15
Knobel v. Pennsylvania R. Co., 192 F. Supp. 771, *aff'd* 296 F.2d 737 (3rd Cir. 1962) 9, 15
Proctor v. Ford Motor Co., 36 Ohio St. 2d 3 (1973) 15
Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500, 77 S. Ct. 443 (1957) 9, 10, 16
Urdang v. Drs. Mahrer, etc., 81 Ohio L. Abs. 23, 158 N.E.2d 902 (Cuy. Co. App., 1959) 14, 15
Waller v. Southern Pacific Company, 57 Cal. Rptr. 353, 424 P.2d 937 (Cal., 1967) 10

Texts

42 OHIO JUR. 2d, §158, p. 22 ..... 11, 15

Statutes and Rules

Federal Employers' Liability Act, 45 U.S.C. §51 ..... 2, 3, 7, 14
Ohio Rules of Civil Procedure, Rule 51(A) 2, 11

Supreme Court of the United States

October Term, 1975
No. .....

FRED J. ZEVCHIK,
Petitioner,

vs.

THE NORFOLK AND WESTERN RAILWAY COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Court of Appeals
Eighth Judicial District of Ohio

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Fred J. Zevchik, prays that a Writ of Certiorari issue to review the judgment of the Ohio Court of Appeals, which judgment became final on May 1, 1975, when the Supreme Court of Ohio denied further appellate review.

OPINIONS BELOW

The judgment and opinion of the Ohio Eighth District Court of Appeals, unreported, appears as Appendix B to this petition. The Order of the Ohio Supreme Court overruling petitioner's Motion to Certify the Record, unreported, appears as Appendix A to this petition. No written opinions appeared in the trial court whose judgment entry appears as Appendix C hereto.

JURISDICTION

The Judgment of the Eighth District Court of Appeals of Ohio was entered January 16, 1975. The Supreme Court of Ohio overruled petitioner's Motion To Certify the Record on May 1, 1975. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS INVOLVED

1. In an action for damages under the Federal Employers' Liability Act, where the claimed negligence of the employer is assignment of the employee, over protest, to labor beyond the employee's physical capacity to perform, the fact that a physician employed by the railroad played some role in approving the employee for work does not require proof of malpractice on the part of the physician in order to hold the railroad liable for injury resulting from such work assignments.

2. No party may assign as error the giving or failure to give any instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection. [Ohio Rules of Civil Procedure, Rule 51(A)].

STATUTORY PROVISION INVOLVED

Federal Employers' Liability Act
45 U.S.C.A. §51

The Federal Employers' Liability Act, 45 U.S.C.A. §51 et seq., in relevant part, provides as follows:

> Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . ., or in the case of the death of such employee, to his or her personal representative . . ., for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

STATEMENT OF THE CASE

Plaintiff filed suit under the Federal Employers' Liability Act (hereinafter referred to as FELA), 45 U.S.C. Sec. 51, et seq. Trial was had with the jury returning its verdict against the railroad in the amount of One Hundred Twelve Thousand Five Hundred Dollars ($112,500.00) on August 31, 1973. Defendant thereafter filed its Motion for New Trial which was overruled on February 27, 1974. The railroad filed its Appeal, and on January 16, 1975, the Court of Appeals for the Eighth District remanded the case to the Common Pleas Court for new trial. Notice of Appeal to the Supreme Court of Ohio was filed February 14, 1975. The Supreme Court of Ohio overruled this respondent's Motion to Certify on May 1, 1975.

STATEMENT OF FACTS AND EVIDENCE

Fred Zevchik, who was 52 years of age at the time of trial (Tr. 33), married with three children, the youngest of whom was 11 at the time of trial, started with the N & W in August, 1950 (Tr. 33) as a car cleaner at the coach yard (Tr. 34) and joined the Signal Department a year or two later, as a Helper (Tr. 34). He continued as a Signal Helper until 1967 and was then given the title of Signal Maintainer in charge of what was known as the Cleveland Territory, which extended from West 38th Street to Euclid junction (Tr. 35). He became a Signal Maintainer; he had a helper for a short time, but the helper quit in approximately July, 1968, and was not replaced (Tr. 36), after which Mr. Zevchik performed the work of Maintainer and helper.

There was an automobile accident on November 19, 1968, in which Zevchik was driving the Company truck on the freeway and was struck from the rear by an automobile. He injured his neck quite severely in this accident (Tr. 38, 39). He was treated by Dr. Edmonds, then the Regional Medical Director of the N & W (Medical Director at the time of trial), from November 19 to December 20, at which time he was released to return to work. Zevchik described three days of duty which was light in nature, and then on December 24, 1968, an assignment to do work which he knew was too heavy for him. He asked for help, which request was refused by his supervisor (Tr. 47-48). He was told to either do the work or quit (Tr. 48). Faced with this option, Zevchik began his work, the first step being to take his grinder out of the truck and test it, in the process of doing which task he twisted his low back giving rise to the injury involved in this action.

Dr. Edmonds, Medical Director of the N & W testified that Fred Zevchik, whose entire medical history was before him, had never had any low back complaints prior to the grinder incident on December 24, 1968, and made it clear that any low back complaints that Fred Zevchik had arose from the grinder incident, and not from the automobile accident.

Dr. Hopwood, Dr. Edmonds' successor as a Regional Medical Director of the N & W, who also treated Zevchik at later dates, testified (Tr. 220) that as to low back difficulties, the automobile accident of November 19, 1968 "probably is not related", and (Tr. 222) that the inference of the testimony is that the low back problems started after the grinder incident on December 24, 1968. And Dr. Hopwood further agreed with plaintiff's counsel (Tr. 228) that Zevchik was unable to perform the duties of a Signalman or a Signal Maintainer because of his low back, and that this problem began December 24, 1968.

Dr. Robert Zaas first saw Zevchik in February, 1969 (Tr. 78), at which time his low back symptoms had persisted for something over three months, and urged him strongly not to return to work at that time (Tr. 84). When he did return to work, Dr. Zaas wrote a note in May, 1969, to the Supervisor of the railroad indicating that if lighter work were available, Zevchik could go back to work (Tr. 87-88). In attempting to get light duty for himself, Zevchik talked with Mr. Bell, a Supervisor (Tr. 58), who told him that if he couldn't do the work he must quit the job, since the railroad had no light duty. He requested a helper and was not given one, and he took, in effect, a demotion to Signalman's Helper, but this did not work out (Tr. 60). Zevchik's work for the railroad ended in 1971 under circumstances wherein he was directed by his supervisor (not

by the railroad doctor) to return to work, or be fired, or be listed as a "voluntary quit", and he did try returning to work.

He was immediately assigned heavy work, including climbing poles, and was denied the opportunity to do any other kind of work and so quit working for the railroad (Tr. 70-71-72). Dr. Zaas testified that, in his opinion, it was the assigning of heavy work that caused his back to deteriorate (Tr. 87), ended in disability.

The Court of Appeals, in its Opinion, states that plaintiff's claim is "that the employees and/or agents of defendant were negligent in ordering plaintiff to do heavy work without assistance when his back was in such a condition that heavy work would necessarily cause further injury", and then states:

> "A significant portion of the testimony adduced at trial dealt with the rule played by Dr. Edmonds, the railroad physician, in the decision to return plaintiff to work. Based on the fact that plaintiff introduced no expert testimony as to either the community standards applicable to doctors in similar cases or whether Dr. Edmonds' treatment of plaintiff failed to meet these standards, defendant moved for a directed verdict on the issue of Dr. Edmonds' negligence. The trial court erred in overruling this motion."

This statement by the Court of Appeals is based upon a few chance remarks made in Final Argument. Actually, very little *testimony* at the trial dealt with Dr. Edmonds' role in the *decision to return plaintiff to work*. No objection was made to Final Argument in this regard.

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

1. In an action for damages under the Federal Employers' Liability Act, where the claimed negligence of the employer is assignment of the employee, over protest, to labor beyond the employee's physical capacity to perform, the fact that a physician employed by the railroad played some role in approving the employee for work does not require proof of malpractice on the part of the physician in order to hold the railroad liable for injury resulting from such work assignments.

The Court of Appeals relied upon *Davis v. Virginian Ry. Co.*, 361 U.S. 354 (1960), in which the United States Supreme Court held that in a FELA case wherein the First Cause of Action alleged that negligence of a railroad's operating personnel caused an injury, and in a Second Cause of Action alleged that malpractice of a railroad physician further injured him, the malpractice Cause of Action is subject to legal rules relating to medical malpractice.

Here, there is no cause of action alleging malpractice, no claim asserted of malpractice. What is here presented is negligence of the railroad in assigning to Zevchik work beyond his physical capacity to perform.

The Court of Appeals holds that by interjecting its physician into the work assignment area, a railroad can convert an FELA case to a malpractice case, with the attendant higher degree of proof.

This is simply not FELA law. There are many cases in which railroad negligence was held to be present in

permitting an employee to return to work, in each case with permission of a railroad physician, without even a suggestion of malpractice present.

Four years after *Davis, supra*, the Supreme Court of the United States, without even referring to *Davis*, decided one such case.

In *Braswell v. Nickel Plate*, 377 U.S. 405, 84 S. Ct. 1628 (1964), there had been a verdict for plaintiff but the Illinois Appellate Court reversed and entered final judgment for the railroad—43 Ill. App. 2d 21, 192 N.E.2d 592 (1963). The U.S. Supreme Court granted certiorari and summarily reversed.

Braswell had worked as a section hand since 1949, and developed a persistent cough in 1955. Late in 1955, he was hospitalized, carcinoma diagnosed, and a portion of his lung removed. An infection later developed in his chest cavity. Not until October, 1956, was he released by his physician and told he was able to return to work.

However, the railroad's examining physician refused to qualify him for work. He did see an assistant medical director in Cleveland who also refused to qualify him but suggested he obtain a report from his own physician to the medical director. Thereafter, a local examining physician qualified him and he returned to work June 13, 1957.

He then worked without complaint until July 3, 1957, when he suddenly collapsed.

None of the doctors called by the plaintiff expressed an opinion as to whether there might have been any relationship between the work he did as a cause of the unconsciousness and fall to the ground and his resulting disability. Most definitely, none of the doctors expressed any opinion that any railroad doctor had failed to meet

the applicable standard of medical care of the community in his treatment of Braswell.

Yet the Supreme Court summarily reversed the Illinois Court and directed that judgment be entered on the original jury verdict. As to the merits, the Supreme Court was unanimous. *Rogers, infra,* was cited. *Davis* was not cited.

Knobel v. Pennsylvania R. Co., 192 F. Supp. 771, *aff'd* 296 F.2d 737 (3rd Cir. 1962), involved a claim under the FELA for wrongful death of a clerk who died as a result of a fall on a marble tile floor.

The decedent had started working with the Pennsy in 1941. In December, 1953, he suffered an epileptic seizure at home. Later, a company doctor examined him and refused to qualify him for work. In August, 1954, he was again held not qualified. In December, 1954, an ophthalmologist recommended a return to work, but with duties limited to those requiring only limited visual acuity.

On this basis, he was qualified and began restricted employment January 3, 1955. He was found dying on May 10, 1955.

The Third Circuit held that the jury with reason could have found the defendant company was negligent in certifying him back to work and assigning him duties that required him to traverse hard-surfaced floors. *Davis* was not mentioned.

In *Dunn v. Conemaugh & Black Lick Railroad,* 267 F.2d 571, 3rd Cir., 1959, the Court discussed the ramifications of the employment by a railroad of a physician, and commented that the relationship of employment involves the right of the employer to set the standards of performance by that employee, raise those standards, or reject the results of that work.

The same is true here. Zevchik's testimony makes it clear that it is his supervisor who assigns him to his work duties, after the doctor has certified him as able to return to work. Thus the reason for the allegations in the Complaint that "the defendant" returned him to full duty before he had fully recovered.

Most persuasive, is *Waller v. Southern Pacific Company*, 57 Cal. Rptr. 353, 424 P.2d 937 (Cal., 1967). In *Waller*, the Supreme Court of California held that in an FELA case, there was sufficient evidence to satisfy the test of *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S. Ct. 443 (1957), wherein it appeared that a man suffering severe coronary from a severe cardiovascular condition was certified as fit to return to work in 1959 by railroad physicians, suffered a worsening of his condition so that those same doctors, in 1961, refused to certify him as fit to work, the suit being based upon the plaintiff's claim that the railroad was negligent in permitting him to return to work when it knew or should have known (through the medical records) that return to work in a tense atmosphere would probably aggravate his condition. Nowhere in the Opinion is it suggested that the railroad is not bound by "its" knowledge of the plaintiff's condition, even though that knowledge be derived through its medical personnel. Nowhere is it suggested that the plaintiff must somehow prove malpractice on the part of the railroad doctors in order to bind the railroad. This, and the other cases cited above, merely emphasize the ingenuity of the defendant in thinking that the *Davis* case applies to any situation other than one in which malpractice is specifically charged.

2. No party may assign as error the giving or failure to give any instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection. [Ohio Rules of Civil Procedure, Rule 51(A)]

The Court of Appeals, in its Opinion stated:

> Civil Rule 51 (A) states in pertinent part, "No party may assign as error the giving or the failure to give any instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection."

At the close of plaintiff's case, the defense moved as follows (Tr. 146):

> Your Honor, at this time, the defense would move for a direction of verdict on that specification of negligence that argues that the railroad physician was negligent in sending Mr. Zevchik to work before he was prepared to go.

As authority for this proposition, defense counsel cited 42 OHIO JUR. 2d, p. 22, §158, which deals with when expert testimony is necessary in a medical malpractice case. *Davis v. Virginian Ry. Co.*, 361 U.S. 354 (1960) was *not* cited to the Court.

It will be noted that defendant, in its Assignment of Error and Brief, quotes no specification of negligence upon which a direction of verdict could be based. The Motion at that time was taken under advisement by the Court.

At the close of all the evidence, during a discussion in chambers of the Court's proposed instructions to the jury, the defense counsel renewed his motion (Tr. 273),

> I would once again renew my Motion for a Direction of Verdict on the specification of negligence that touches on the doctor being in error in sending the man back to work and continuing to send him back to work on the grounds that there has not been sufficient evidence to allow the jury to infer that the doctor was negligent.

In the following discussion (Tr. 273), defense counsel stated,

> I am not saying that this is a medical malpractice case.

Again, *Davis* was not cited. The Motion was denied.

It is to be noted that *there is no specification of negligence* in the Complaint dealing with medical malpractice. *There is no separate Cause of Action* in the Complaint dealing with medical malpractice. There is *no record of any objection* on the part of defense counsel *to plaintiff's argument* on the points raised in the Court of Appeals dealing with the alleged claim that plaintiff was asserting a malpractice case against Dr. Edmonds. There is no request by defense counsel for the Court to use certain language in its charge informing the jury that they are not to consider malpractice on the part of Dr. Edmonds.

Most important, there is *nothing* in the instructions of the Court concerning negligence on the part of the doctor being a ground for recovery by the plaintiff against the defendant, nor is there any exception taken by the defense counsel to the Court's omission of any instructions on this point.

Defendant asserts that *Davis v. Virginian Ry. Co.*, (*supra*) disposes of this case. Plaintiff claims that *Davis* is *limited* to cases where malpractice is asserted.

In *Davis*, the Complaint set forth two counts: First, that the negligence of the railroad caused his broken leg; and Second, that the injury was aggravated by the malpractice of the railroad's employee-doctor. The lower court dismissed the case as to both counts. The Supreme Court held that the case must go to the jury on the first count, but that the evidence was insufficient as to the second count.

The result, of course, would be a trial asserting negligence of the railroad in causing him to break his leg. The sequelae of that broken leg would be of no significance whatever, since whatever happened to his leg as a result of the initial break would be part of that case.

So here, as well. The Complaint alleges that Fred Zevchik was required to resume heavy duty before he had fully recovered.

The defendant asserts that if this were true, the fault would be that of Dr. Edmonds, thus constituting malpractice. Plaintiff disagrees. Dr. Edmonds qualified him for work. Other personnel of the railroad assigned his duties. The jury could most certainly conclude from the evidence that Dr. Edmonds, supplied by his employers with job descriptions and with information concerning union contract requirements, felt that Zevchik's duties were mostly supervisory, not requiring heavy work.

If this information was not correct, again it is railroad officials other than Dr. Edmonds who were negligent.

The fact is that "the railroad" forced him to return to heavy duty, but was free at all times to assign Zevchik duties within his physical capacities as he asserted them to be. Dr. Edmonds did not assign Zevchik his duties. He stated only in his opinion Zevchik was qualified for work.

CONCLUSION

There are many railroad employees in Ohio. They are not eligible, as are other workmen, for Workmen's Compensation Benefits, but rather their sole remedy for injuries at work is the Federal Employers' Liability Act (hereafter FELA).

The FELA, unlike the Workmen's Compensation Act, requires that the injured workman prove that employer negligence played a part in causing his injuries.

In the fact situation here presented, there can be no question that Zevchik would have been covered by Workmen's Compensation had he not been a railroad employee, regardless of what doctor treated him.

Equally, since the jury found that Zevchik suffered his low back injury on December 24 while at work and that negligence of his supervisor played a part in causing that injury, the railroad would remain liable for complications of that injury even if due to malpractice by the railroad doctor.

Yet here the Court of Appeals has held that if a railroad doctor approves an injured man for work, the railroad is exonerated from liability unless plaintiff proves malpractice on the part of the doctor.

Further, the Court of Appeals entirely ignores its prior decision in *Urdang v. Drs. Mahrer, etc.*, 81 Ohio L. Abs. 23, 158 N.E.2d 902 (Cuy. Co. App., 1959) in which headnote 1 states:

> Ordinarily, expert evidence is essential to support action for malpractice; but expert evidence was not necessary to prove that defendant doctors had been

> negligent in failing to provide assistance for 76-year old patient who fell over step while leaving bathroom, whence she had been escorted for purpose of relieving her intestines of foreign substance after being given barium enema at defendants' offices; and lay testimony adduced, in action for injuries sustained by such patient, was sufficient to take to jury issue as to whether defendants had been negligent in that regard.

We read *Urdang* plainly to belie defendant's bold and absolute assertion that expert testimony is needed. *Urdang* involved a physician as a defendant and the physician's negligence which the Court there held was provable by lay testimony derived from medical treatment—the barium enema. Certainly then there may well be circumstances where it is not necessary to produce expert testimony to establish negligence of a physician where such negligence is unrelated to medical treatment.

And we submit that the case at bar is a good example of this.

Nearly every employee of a railroad in the United States is affected by the decision of the Court of Appeals below.

As to non-railroad industrial workers, the Appeals Court has previously held that no separate claim may be made beyond Workmen's Compensation for malpractice of the company doctor. *Proctor v. Ford Motor Co.*, 36 Ohio St. 2d 3 (1973). Such results of an injury are included in the original claim for injury.

So also here, and in *Davis* on re-trial, and in *Waller*, *Braswell*, *Knobel*, and *Dunn*. Malpractice need not obscure the basic rule that in an FELA case,

The test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. (*Rogers v. Missouri Pacific Railroad Co.*, (1957), 352 U.S. 500, 506-507, 77 S. Ct. 443, 448-449, 1 L. Ed. 2d 493)

Respectfully submitted,

SAMUEL T. GAINES
HAROLD H. SAYRE
METZENBAUM, GAINES & STERN CO., L.P.A.
1700 Investment Plaza
1801 East 9th Street
Cleveland, Ohio 44114
696-4666
Attorneys for Petitioner

APPENDIX A

Entry of the Supreme Court of Ohio Denying Leave to Appeal

(May 1, 1975)

No. 75-235

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

FRED J. ZEVCHIK,
Appellant,

vs.

NORFOLK & WESTERN RAILWAY CO.,
Appellee.

MOTION FOR AN ORDER DIRECTING
THE COURT OF APPEALS
FOR CUYAHOGA COUNTY
TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

APPENDIX B

Opinion and Journal Entry of the Cuyahoga County Court of Appeals

(January 16, 1975)

No. 33485

COURT OF APPEALS OF OHIO,
EIGHTH DISTRICT, COUNTY OF CUYAHOGA

FRED J. ZEVCHIK,
Appellee,

vs.

THE NORFOLK AND WESTERN RAILWAY COMPANY,
Appellant.

JOURNAL ENTRY

This cause came on to be heard upon the pleadings and the transcript of the evidence and record in the Common Pleas Court, and was argued by counsel; on consideration whereof, the court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and judgment of said Common Pleas Court is reversed. Each assignment of error was reviewed by the court and upon review the following disposition made:

Plaintiff appellee Fred Zevchik filed a complaint under the Federal Employer's Liability Act (hereinafter F.E.L.A.), 45 U.S.C., § 51, *et seq.* The complaint alleged that as a direct result of the negligent acts of the defen-

dant, The Norfolk and Western Railway Company, plaintiff suffered painful, incapacitating injuries to his lower back.

The case went to trial on August 21, 1973. Various testimony was elicited at trial, tending to show that several different incidents, some unrelated to plaintiff's claim against defendant, may have contributed to plaintiff's lower back condition.

In chronological order, the testimony revealed the following four incidents. First, on November 19, 1968, plaintiff was "rear-ended" while driving a truck under circumstances unrelated to the present claim. Plaintiff went to Dr. Edmonds, the Regional Medical Director for defendant, and was treated for neck injuries received in the rear-end collision. Dr. Edmonds permitted plaintiff to return to work on December 20, 1968. Second, on December 24, 1968, during the course of his work as a signal maintainer, plaintiff attempted to remove a forty pound grinder from a truck. Plaintiff testified that he strained his lower back while lifting the grinder. Plaintiff again went to Dr. Edmonds who kept him off work until approximately January 20, 1969. Plaintiff continued to complain about his back and, after consulting his own physician, Dr. Zaas, plaintiff missed work for intermittent periods throughout 1969. Third, in September of 1969, plaintiff slipped and fell at work, further aggravating his back injury. Fourth, on December 3, 1971, plaintiff hit a brick culvert while driving 35 miles per hour in his own car.

After hearing this testimony, the jury returned a verdict for plaintiff in the amount of $112,500. Defendant's motion for a new trial was denied. Whereupon, defendant appealed, assigning three errors set out and ruled upon below.

Assignment of error No. 1:

> "The trial court erred in refusing to direct a verdict in favor of the railroad on plaintiff's claim that the railroad physician was negligent."

This assignment of error is well taken.

The gravamen of plaintiff's claim is that the employees and/or agents of defendant were negligent in ordering plaintiff to do heavy work without assistance when his back was in such a condition that heavy work would necessarily cause further injury.

A significant portion of the testimony adduced at trial dealt with the role played by Dr. Edmonds, the railroad physician, in the decision to return plaintiff to work. Based on the fact that plaintiff introduced no expert testimony as to either the community standards applicable to doctors in similar cases or whether Dr. Edmonds' treatment of plaintiff failed to meet these standards, defendant moved for a directed verdict on the issue of Dr. Edmonds' negligence. The trial court erred in overruling this motion.

In an action brought under the F.E.L.A., *Davis v. Virginian Ry. Co.* (1960), 361 U.S. 354, the United States Supreme Court held that proof of malpractice requires two evidentiary steps: (1) evidence of the recognized community standards in the particular type of case; (2) a showing that the physician in question departed from this standard.

Plaintiff argues that this is not a malpractice case, but an F.E.L.A. case, and that *Davis* therefore does not apply. This argument is not well taken. *Davis* was also an F.E.L.A. case in which the plaintiff attempted to hold the defendant railroad responsible for the negligence of a rail-

road physician. The Supreme Court held that the issue of the physician's negligence was properly taken from the jury because the evidence was insufficient to support a malpractice claim.

While plaintiff's claim in the case at bar did not contain a separate count based on malpractice, the issue of Dr. Edmonds' negligence was raised by both the evidence produced at trial and the general charge in plaintiff's complaint that employees and/or agents of defendant were negligent. *Davis* requires that the issue of Dr. Edmonds' negligence should have been taken from the jury because plaintiff offered insufficient proof of malpractice.

Assignment of error No. 2:

> "The verdict was prompted by prejudicial comments about plaintiff's lowly station in life which were objected to and overruled."

This assignment of error is not well taken and is overruled.

Defense counsel made two objections to comments made by plaintiff's counsel during closing argument. Both objections followed references by plaintiff's counsel to the fact that plaintiff had an eleven-year-old daughter at home. A reading of the record reveals that these comments could have been offered to explain why plaintiff repeatedly returned to work even though his injuries were as severe as he claimed at trial. As such, the comments were not improper. Further, considering the broad discretion granted trial courts in controlling closing argument, and the relatively innocuous nature of the comments, we find that the trial court's rulings do not constitute an abuse of discretion and are, therefore, not reversible error.

Assignment of error No. 3:

> "The trial court erred in refusing to instruct the jury that plaintiff bears the burden of excluding the effectiveness of causes of his disability for which the railroad was admittedly not responsible."

This assignment of error is not well taken and is overruled.

Defense counsel made an objection to the jury charge, stating: "I would note an exception to the court's refusal to charge that causes not proved. . . ." At this point, the trial court interrupted to say, "In connection with the special charge?" Defense counsel replied, "In connection with the special charge. This is all I have." (R. 346).

Civil Rule 51(A) states in pertinent part: "No party may assign as error the giving or the failure to give any instruction unless he objects thereto before the jury retires to consider its verdict, *stating distinctly the matter to which he objects and the grounds for his objection.*" (Emphasis added.) The record in this case does not contain a distinct statement of the grounds for defendant's objection. In his appellate brief appellant states that he wanted the trial court to charge the jury on the rule of law taken from *Gedra v. Dallmer* (1950), 153 Ohio St. 258.

The second syllabus of *Gedra* states that:

> "2. In a negligence action, it is not sufficient for plaintiff to prove that the negligence of defendant might have caused an injury to plaintiff but, if the injury complained of might well have resulted from any one of several causes, it is incumbent upon plaintiff to produce evidence which will exclude the effectiveness of those causes for which defendant is not legally responsible."

However, *Gedra* deals with a situation wherein plaintiff received *one* injury, a rat bite, while attending defendant's theater. The presence of the rats in defendant's theater may have been caused by defendant's negligent maintenance of the theater or by any one of several other causes. *Gedra* does not deal with a situation such as that contained in the case at bar, where plaintiff received several aggravations of the same injury.

A party whose request for jury instructions fails to embody the correct law governing an issue, and who otherwise fails to comply with Civil Rule 51(A), waives his right to question the trial court's charge upon appeal. *Presley v. Norwood* (1973), 36 Ohio St. 2d 29.

Further, the trial court did charge that ". . . you may only include an element of damages if it is caused in whole or in part by any negligence of the defendant established by a preponderance of the evidence." (R. 342). This is a proper statement of F.E.L.A. law.

For the foregoing reasons, assignment of error number three is overruled, without prejudice to the right of defendant upon remand to distinctly request a proper charge dealing with the aggravation of existing injuries.

Because assignment of error number one is well taken, the cause is reversed and remanded for a new trial.

No other error appearing in the record, this cause is remanded to the Common Pleas Court for new trial.

It is therefore considered that said appellant recover of said appellee its costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

JACKSON, P.J., CORRIGAN, J., COOK, J., concur

(Cook, J., of the 11th Appellate District, sitting by assignment.)

/s/ LEO A. JACKSON
Presiding Judge

APPENDIX C

Judgment Entry of the Court of Common Pleas Of Cuyahoga County

(February 15, 1974)

Motion by the deft. Norfolk & Western Railway for a new trial is overruled.

/s/ PRYATEL
Judge